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SUPREME COURT, U.S.

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NO. 80-5693

ORIGINAL COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MURRIEL DON CRAWFORD, JR.,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

PETITIONER'S RESPONSE TO "RESPONDENT'S MEMORANDUM OPPOSING CERTIORARI, ALTERNATIVE MOTION TO DEFER THE COURT'S CONSIDERATION UNTIL FINAL JUDGMENT IN THE TEXAS COURT OF CRIMINAL APPEALS, AND MOTION FOR EXTENTION OF TIME IN WHICH TO FILE ITS BRIEF IN OPPOSITION"

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ATTORNEYS FOR PETITIONER

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MOTION FOR EXTENTION OF TIME IN WHICH
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TO THE HONORABLE JUSTICES OF SAID COURT:

COMES NOW the Petitioner, by and through his attorneys of record, and presents this his Response to the "Respondent's Memorandum Opposing Certiorari, Alternative Motion to Defer the Court's Consideration Until Final Judgment in the Texas Court of Criminal Appeals, and Motion for Extention of Time in Which to File its Brief in Opposition" and as grounds therefor, would respectfully show this Honorable Court the following:

STATEMENT OF THE CASE

On July 16, 1980, Petitioner's direct appeal was affirmed on original submission by the Texas Court of Criminal Appeals. On July 30, 1980, Petitioner's Motion for Leave to File Rehearing was timely filed. Rule 11, Rules of the Texas Court of Criminal Appeals. On September 17,

1980, Petitioner's Motion for Leave to File Rehearing was denied.

On October 1, 1980, Petitioner's "Second Motion for Leave to File Motion for Rehearing" was received in the Texas Court of Criminal Appeals [See Exhibit I]. Petitioner's "Second Motion for Leave to File Motion for Rehearing" was not authorized by the Rules of the Texas Court of Criminal Appeals. See Rule 11, Rules of the Texas Court of Criminal Appeals. Nevertheless, the Court of Criminal Appeals granted leave to file the unauthorized "Second Motion for Leave to File Motion for Rehearing" on October 22, 1980.[1] Then, on October 29, 1980, Petitioner's "Supplemental Memorandum in Support of Appellant's Second Motion for Rehearing" was received in the Texas Court of Criminal Appeals [See Appendix II].

Thereafter, on November 12, 1980, Petitioner's "Motion for Leave to Proceed In Forma Pauperis..." and "Petition for Writ of Certiorari to the Texas Court of Criminal Appeals" were filed in this Honorable Court. Pursuant to Rule 20.1, Rules of the Supreme Court, the Petition for Writ of Certiorari was timely filed.[2] Under Rule 20.4, supra, Petitioner could not file a timely petition for certiorari after November 16, 1980, inasmuch as the Rules of the Texas Court of Criminal Appeals do not authorize the filing of a Second Motion for Leave to File Motion for Rehearing. See Rule 11, Rules of the Texas Court of Criminal Appeals. Accordingly, Petitioner's petition for writ of certiorari is NOT premature and it

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1. Petitioner objects to Respondent's characterization of Petitioner's actions as "the unusual procedural means by which Petitioner has convinced the Texas Court of Criminal Appeals to reconsider his case..." [emphasis added]. Respondent is well aware that such unauthorized motions are uniformly filed with the Court of Criminal Appeals, and the only "unusual procedure" is the fact that the Court of Criminal Appeals fails to follow their own written rules.
2. November 12, 1980, was within sixty (60) days from September 17, 1980, the date that Petitioner's timely filed (and authorized) Motion for Rehearing was overruled. See Rule 20.4, Rules of the Supreme Court.

should not be dismissed.

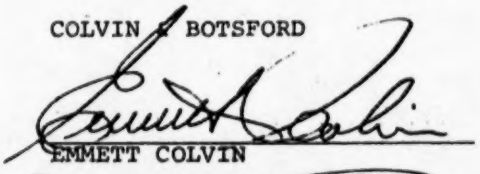
Petitioner is aware that his unauthorized "Second Motion for Leave to File Motion for Rehearing", when coupled with the granting of said motion by the Texas Court of Criminal Appeals, has interjected a degree of uncertainty into the judgment. Thus, Petitioner has no objection to Respondent's motion to defer this Honorable Court's consideration of the petition for certiorari pending final judgment in the Texas Court of Criminal Appeals. Furthermore, Petitioner has no objection to Respondent's request for an extension of time to file its brief in opposition to certiorari.

CONCLUSION

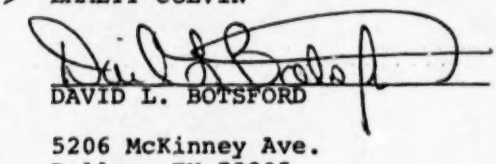
WHEREFORE, PREMISES CONSIDERED, Petitioner prays that Respondent's motion to deny the petition for writ of certiorari be denied.

Respectfully submitted,

COLVIN & BOTSFORD



EMMETT COLVIN



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CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that one copy of the above and foregoing document was mailed, first class postage prepaid, to Honorable Mark White, Attorney General of the State of Texas, on this the 8th day of December, 1980.

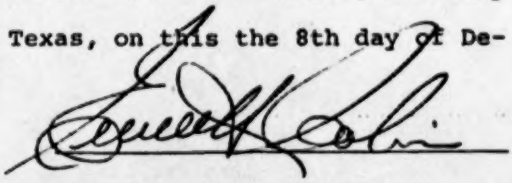

EXHIBIT 1

FILED IN
COURT OF CRIMINAL APPEALS
OCT 28 1980
Thomas Lowe, Clerk

IN THE

COURT OF CRIMINAL APPEALS

OF TEXAS

NO. 57,602

MURRIEL CRAWFORD, JR.,
Appellant

VS.

THE STATE OF TEXAS
Appellee

Appeal from the 181st District Court No. 17,618-B

Potter County, Texas

SECOND MOTION FOR LEAVE TO FILE MOTION FOR REHEARING

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ATTORNEY FOR APPELLANT

RECEIVED IN
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VS.

THE STATE OF TEXAS

Appeal from the 181st District Court No. 17,618-B

Potter County, Texas

SECOND MOTION FOR LEAVE TO FILE MOTION FOR REHEARING

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW MURRIEL CRAWFORD, JR., Appellant, in the above styled and numbered cause and moves this Honorable Court for leave to file a motion for rehearing and in support thereof would show the Court as follows:

I.

That on the 16th day of July, 1980, this Honorable Court delivered its opinion affirming the judgment of conviction in this cause.

II.

The Crawford case was affirmed by this Honorable Court shortly before the opinions of Grijalva v. State, No. 65,174, dated September 10, 1980, and Loudres v. State, No 63,676, were delivered. It is respectfully submitted that the facts in Crawford and Loudres and Grijalva are identical.

III.

It is suggested that the Trial Court erred in excusing a venireman in violation of the recent United States Supreme Court opinion in Adam vs. State of Texas 27 CrL 3229.

WHEREFORE, PREMISES CONSIDERED, the Appellant respectfully prays that this Honorable Court will grant this Motion for leave to file motion for rehearing and cause to be filed the accompanying motion for rehearing.

Respectfully submitted,

SELDEN B. HALE
Attorney at Law
310 West Sixth Street
Amarillo, Texas 79101

Counsel for Appellant

EXHIBIT 2

RECEIVED IN
COURT OF CRIMINAL APPEALS
OCT 2 1980
Thomas Lowe, Clerk

NO. 57,602

MURRIEL CRAWFORD, JR.	§	IN THE TEXAS COURT
VS.	§	OF
THE STATE OF TEXAS	§	CRIMINAL APPEALS

SUPPLEMENTAL MEMORANDUM IN
SUPPORT OF APPELLANT'S
SECOND MOTION FOR REHEARING

TO THE HONORABLE JUDGES OF SAID COURT:

On October 22, 1980, this Honorable Court permitted Appellant to file his Second Motion For Rehearing. The following is submitted in support of Appellant's "Point of Error No. 8", and deals with Judge Roberts' dissenting opinion on original submission:

I.

In Beck v. Alabama, ___U.S. ___, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), the Supreme Court was confronted with a challenge to the Alabama death penalty statute and held that a sentence of death could not be constitutionally imposed after a jury verdict of guilt of a capital offense when that jury was statutorily precluded from considering a verdict of guilt of a lesser included non-capital offense when the evidence would have supported a verdict of such a lesser included non-capital offense.

In Evans v. Britton, No. 79-2674 (October 15, 1980), the United States Court of Appeals for the Fifth Circuit was confronted with a challenge, via habeas corpus, identical to that raised in Beck. However, in Evans, the state argued that Evans had not been

harmed by the Alabama "preclusion clause" since Evans had not even attempted to introduce evidence of a lesser included offense at trial. The Fifth Circuit, in granting habeas corpus relief to petitioner, stated:

> "It seems to us, however, that it offends the most fundamental notions of fairness for the state to tell Evans that there is no lesser offense and then later urge that his death sentence should be upheld because he failed to present evidence which would prove a lesser included offense." Slip opinion at 357.

Evans is directly analgous to the position taken by Judge Roberts on original submission. It is respectfully submitted that Judge Roberts' position is the correct position and that on the basis of Evans, the State of Texas should not be permitted to whipsaw Appellant herein.

The judgment and sentence of death must be reversed and the cause remanded for a new trial.

Respectfully submitted,

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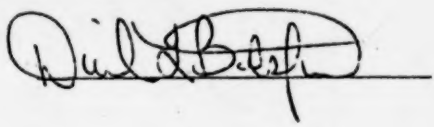
CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that on this the 27th day of October, 1980, a true and correct copy of the above and foregoing memorandum was mailed to the Potter County District Attorney's Office.



John Louis EVANS, III,
Petitioner-Appellant,

v.

Robert G. BRITTON, Commissioner, Alabama Board of Corrections, and Joseph Oliver, Warden, Holman Prison,
Respondents-Appellees.

No. 79-2674.

United States Court of Appeals,
Fifth Circuit.

Oct. 15, 1980.

Petitioner, who was convicted of capital murder in an Alabama state court, appealed from order of the United States District Court for the District of Alabama, 472 F.Supp. 707, William Brevard Hand, J., which denied his petition for a writ of habeas corpus. The Court of Appeals held that Alabama death penalty statute, which precluded jury from considering lesser included offenses in capital cases, was unconstitutional.

Reversed.

Daniel Holcombe Thomas, District Judge, sitting by designation, filed dissenting opinion.

Criminal Law ⇐795(1)
Habeas Corpus ⇐30(3)

Alabama death penalty statute, which precluded jury from considering lesser included offenses in capital cases, was unconstitutional; thus, defendant, who was convicted under such statute, was entitled to habeas corpus relief. 28 U.S.C.A. § 2254; Code of Ala.1975, § 13-11-2.

Appeal from the United States District Court for the Southern District of Alabama.

Before VANCE and SAM D. JOHNSON, Circuit Judges, and THOMAS,* District Judge.

PER CURIAM:

John Louis Evans, III, was convicted of capital murder by a jury and was sentenced to death in an Alabama state court. In his 28 U.S.C. § 2254 petition for habeas corpus relief, denied by the district court, 472 F.Supp. 707, he alleges that because the Alabama death penalty statute, Code of Ala. § 13-11-2 (1975), deprived him of due process of law and equal protection and constituted cruel and unusual punishment in violation of the United States Constitution, his conviction must be reversed. The Alabama statute precludes the jury from considering lesser included offenses in capital cases; thus it gives the jury the option of convicting a defendant of the capital offense or of acquitting him.

In *Beck v. Alabama*, — U.S. —, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), the United States Supreme Court was presented with a challenge to the Alabama death penalty statute and held that a death sentence could not constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict. The state argues that *Beck* does not control this case.

* United States District Judge for the Southern District of Alabama, sitting by designation.

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The Synopsis, Syllabi and Key Number Classifications constitute no part of the opinion of the court.

In *Beck*, the state conceded that Beck's testimony would have entitled him to an instruction on a lesser included offense, absent the statutory prohibition. The state says that there was no evidence adduced by Evans which would require instruction on a lesser offense even if such instruction were not prohibited. It urges that we certify to the Alabama Supreme Court whether the constitutionally offensive portions of the Alabama Capital Punishment Statute may be severed from the remainder of the Statute. It reasons that Evans' conviction should be allowed to stand with the preclusion clause severed from the Statute.

We cannot reconcile this position with the Supreme Court's language in *Beck*:

> In the final analysis the difficulty with the Alabama statute is that it interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime. Thus, on the one hand, the unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason—its belief that the defendant is guilty of some serious crime and should be punished. On the other hand, the apparently mandatory nature of the death penalty may encourage it to acquit for an equally impermissible reason—that, whatever his crime, the defendant does not deserve death. In any particular case these two extraneous factors may favor the defendant or the prosecution or they may cancel each other out. But *in every case they introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case.*

— U.S. at ——, 100 S.Ct. at 2392 (emphasis added).

Obviously we cannot conclude that Evans' trial under an unconstitutional statute was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). The peculiar nature of the offensive statute would infect virtually every aspect of any capital defendant's trial from beginning to end. Each and every decision concerning trial strategy, the selection of evidence to use and its presentation, the argument of counsel, objections, requests for charges, all were inevitably influenced by the brooding omnipresence of the unconstitutional edict—Evans must either be sentenced by the jury to die or he must be set free.

The state says that harm to Evans is sheer speculation because he did not even undertake to prove a lesser offense. It seems to us, however, that it offends the most fundamental notions of fairness for the state first to tell Evans that there is no lesser offense and then later urge that his death sentence should be upheld because he failed to present evidence which would prove a lesser included offense.

We will not speculate as to whether if tried under a constitutional statute Evans will adopt some different strategy or whether he can present evidence of some less serious offense. We also will not speculate as to whether the Supreme Court of Alabama can judicially tailor the state statute to pass constitutional muster. We decline to certify his case to the state court because, as to Evans, certification would be nothing more than an empty academic exercise. The infirmity in his trial cannot be excised retroactively. Evans may not be executed until and unless he be tried, convicted and sentenced in a manner that at least meets minimum constitutional standards. His trial, conviction and sentence now before us was under a statute which the Supreme Court says introduces *in every case* a level of uncertainty and unreliability that cannot be tolerated.

The judgment of the district court denying relief under 28 U.S.C. § 2254 must be reversed.

REVERSED.

DANIEL HOLCOMBE THOMAS, District Judge, dissenting:

This writer respectfully dissents. I would certify to the Alabama Supreme Court the question of whether the preclusion clause of the Alabama Capital Punishment Statute may be severed from the remainder of the Statute.

The State of Alabama has filed a motion requesting that the certification be granted. I think that the question of severability is a question of Alabama law and that certification to the Alabama Supreme Court should be granted.

I dissent.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.